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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1086

MARTIN MALINOU,
PUBLIC ADMINISTRATOR,
Petitioner,

v.

LEONARD A. KIERNAN,
PUBLIC ADMINISTRATOR,
AND
FRANCIS J. MAGUIRE,
PUBLIC ADMINISTRATOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Rhode Island rendered on November 7, 1967, in case No. 44-Appeal, styled MARTIN MALINOU, PUBLIC ADMINISTRATOR V. LEONARD A. KIERNAN, PUBLIC ADMINISTRATOR, wherein the Rhode Island Supreme Court denied and dismissed the Petitioner's appeal.[1]

[1] Finality of the judgment sought to be reviewed is a reasonable possibility, however all possible doubts as to finality are not removed. See REASONS FOR GRANTING THE WRIT, infra, p. 19.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court (R. 26) is not yet officially reported; it is unofficially reported in 235 A.2d 105; and it is printed in Appendix A hereto. The memorandum opinion of the Rhode Island Supreme Court (R. 5), denying the Petitioner's motion for leave to file a petition for reargument, and denying the Petitioner's motion to re-settle the judgment is not yet officially reported; it is unofficially reported in 235 A.2d 105, 110. The Rhode Island Superior Court did not decide the merits of the case and did not deliver an opinion. The Probate Court of the City of Providence did not deliver an opinion.

JURISDICTION

The Rhode Island Supreme Court judgment sought to be reviewed (R. 34; Appx. A, p. A-7 was rendered on November 7, 1967 (R. 35). The Petitioner's timely motion for leave to file a petition for reargument (R. 12) was denied on November 21, 1967 (R. 5). The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since the Petitioner specially claims a right to equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and also since the Petitioner specially claims a substantive right of property under the Fourteenth Amendment, and also since the Petitioner specially claims a right to procedural due process under the Fourteenth Amendment, and also since the Petitioner specially claims the title to a public office as a substantive property right under the Fourteenth Amendment, and also since the Petitioner specially claims a right under 28 U. S. C. 1257(3) to file this petition for certiorari to preserve any future possibility he has of securing review in this Court of the action of the Rhode Island Supreme Court taken in this case on November 7, 1967.

QUESTIONS PRESENTED

QUESTION I

Did the Rhode Island Supreme Court's refusal to enforce Providence, R. I. Rev. Ord. (1946) Ch. 2, Art. XV, Sec. 159, requiring Respondent Kiernan to pay a ten dollar ($10) qualifying fee for his commission to the office of Public Administrator, together with a simultaneous refusal to follow *Robbins v. Tafft*, 12 R. I. 67 and probate court practice to the effect that the Petitioner's right to administer the Cumber Estate is not forfeited by his not petitioning therefor, deny the Petitioner the "equal protection" of the ordinance and the case law, to the end result of denying him his right to administer the Cumber Estate, contrary to the Equal Protection Clause of U.S. Const. Amend. XIV, Sec. 1?

QUESTION II

Did the Rhode Island Supreme Court deprive the Petitioner of his right to administer the Cumber Estate without procedural due process as required by U. S. Const. Amend. XIV, Sec. 1, in that the court promulgated a retroactive procedural rule requiring Petitioner to petition for administration d/b/n on the Cumber Estate but did not remand for taking evidence tending to establish Petitioner's timely petition therefor?

QUESTION III

Did the Rhode Island Supreme Court deprive Petitioner of his "property" in the title to the office of Public Administrator and of his right as such to administer the Cumber Estate, "without due process of law" within the meaning of U.S. Const. Amend. XIV, Sec. 1, in that the court emasculated provisions of the Statute of Escheats, R. I. Pub. L., 1961, Ch. 195, Secs. 6-7, which delegated administration of intestate estates to the Attorney General but saved "the authority of any public administrator, heretofore established" and thereby impliedly repealed the city council's power to elect Respondents Kiernan and Maguire?

QUESTION IV

Did Section 11 of the Public Administrator Act, R. I. Acts, 1876, Ch. 567, as amended by R. I. Acts, 1950, Ch. 2596, vest the Petitioner with a "property" right, within the meaning of U.S. Const. Amend. XIV, Sec. 1, to complete his immediate predecessor Gallagher's administration of the Cumber Estate, by reason of Gallagher's death during Petitioner's term as Public Administrator?

QUESTION V

Did the Rhode Island Supreme Court's refusal to enforce Providence, R. I. Rev. Ord. (1946) Ch. 2, Art. XV, Sec. 159, requiring Respondent Kiernan to pay a ten dollar ($10) qualifying fee for his commission to the office of Public Administrator deprive Petitioner of his "property" right to hold over in that office, and therefore of his right to administer the Cumber Estate, as against Kiernan for failure of Kiernan to comply with the fee condition precedent to investiture with title to that office, contrary to the Due Process Clause of U. S. Const. Amend. XIV, Sec. 1?

QUESTION VI

Did the pendency of a petition for administration d/b/n on the Cumber Estate filed by the Petitioner, qua party-in-interest, before the Respondent Kiernan, qua Public Administrator, filed a similar petition therefor, vest the Petitioner with a prior "property" right of administration within the meaning of U.S. Const. Amend. XIV, Sec. 1, as against Kiernan, by virtue of the priorities announced in *Malinou v. Cairns*, 231 A.2d 735 (RI 1967)?

QUESTION VII

Is the Rhode Island Supreme Court judgment, denying and dismissing the Petitioner's appeal, a final judgment within the meaning of 28 U. S. C. 1257(3) although it did not affirm, reverse or modify the probate court decree, or grant or deny the Respondent Maguire's motion to intervene?

STATUTES AND ORDINANCES INVOLVED

The case involves "AN ACT PROVIDING FOR THE APPOINTMENT OF A PUBLIC ADMINISTRATOR IN THE CITY OF PROVIDENCE" (hereinafter Public Administrator Act), R. I. Acts, 1876, Ch. 567, as amended by R. I. Acts, 1950, Ch. 2596:

"Section 1. The city council of the city of Providence may appoint some suitable person, being an inhabitant of said city, to be public administrator therein; and the person so appointed shall hold his office during the pleasure of the city council.

Sec. 2. Such administrator shall take out letters of administration and faithfully administer upon the estate of any person who dies intestate within the City of Providence or elsewhere, leaving property in the said city to be administered *and no administration having been granted or proceedings therefor pending*, such person at the time of his decease not being an inhabitant or resident of any other town or city in this State, and not leaving a known husband, widow or next of kin *within this State*, which fact shall be established by proof satisfactory to the Probate Court of the City of Providence.

Sec. 3. Administration shall not be granted to a public administrator within thirty days next after the decease of such intestate.

Sec. 4. After granting letters of administration to a public administrator, and before the final settlement of the estate, if the husband, widow or any next of kin of the deceased, in writing claims the right of administration, or requests the appointment of some other suitable person to the trust, the municipal court in the city of Providence shall grant letters of administration accordingly. Upon the appointment of a successor, and his giving the bond required, the powers of the public administrator over the estate shall cease.

Sec. 5. Such public administrator shall deliver into the municipal court his letters of administration

upon the estate of any person deceased, if a will of such person is thereafter allowed and proved. Upon the appointment of an executor or administrator as his successor in any case, he shall surrender his letters of administration into the municipal court with an account upon oath of his doings thereon; and upon the allowance of his account by the municipal court, shall pay over and deliver to his successor all sums of money in his hands, and all property, effects and credits of the deceased not administered.

Sec. 6. Such public administrator shall give bond to the municipal court for the faithful performance of his duties, in like manner as required of other administrators, with the further condition to comply with the provisions of the preceding section.

Sec. 7. Such public administrator may be licensed to sell real estate for the payment of debts, and shall administer estates and render his account, in the same manner as other administrators, except as herein otherwise provided.

Sec. 8. When an estate has been fully administered by such public administrator, and the debts paid according to law; he shall deposit the balance of such estate remaining in his hands with the treasurer of the city of Providence, who shall receive and hold it for the benefit of those who may have lawful claims thereon.

Sec. 9. Such public administrator shall render an account of his proceedings to the municipal court of said city, at least once in each year, until the trust has been fulfilled. And when, upon a final settlement of any estate, it appears that moneys remain in the hands of such administrator, which by law should have been deposited with the city treasurer, the municipal court shall certify that fact and the statement of the amount to said treasurer, who, unless such deposit is made within thirty days after the receipt of such notice, shall cause the bond of the administrator to be prosecuted for the recovery thereof.

Sec. 10. All money or other property received by the city treasurer of the city of Providence, under the provisions of this act, shall be held for the same uses, as provided by chapter 177 of the General Statutes.

Sec. 11. Upon the death, resignation or other disqualification of a public administrator leaving an estate or estates not fully administered, it shall be the duty of the municipal court, upon application of the city treasurer, to appoint some suitable person to have the charge and care of the personal estate not administered, to hold the same until a successor to such deceased, resigned or disqualified public administrator shall be duly appointed, to whom the municipal court shall grant letters of administration de bonis non upon his giving the required bond.

Sec. 12. Upon the death, resignation or other disqualification of a public administrator, the city council shall fill the vacancy forthwith.

Sec. 13. When a public administrator neglects to return an inventory, settle an account, or perform any other duty incumbent upon him, (and there appears no heir entitled thereto), the city treasurer shall, in behalf of the said city of Providence, prosecute all suits and do all acts necessary and proper to ensure a prompt and faithful administration of the estate, and the payment of the proceeds thereof into the treasury."

Section 2, as amended, may be found in the Rhode Island Acts and Resolves of 1950, January Session, at pages 661-662. Sections 1 and 3 through 13 may be found in the Rhode Island Acts and Resolves of 1876, May Session, at pages 2-4 together with the original text of Section 2. (Italics have been supplied to show the phraseology added by the 1950 Amendment.)

The case also involves parts of sections 6 and 7 of "AN ACT IN AMENDMENT OF AND IN ADDITION TO CHAPTER 33-20 OF THE GENERAL LAWS, ENTITLED 'ABSENTEES' ESTATES',

AND CHAPTER 33-21 OF THE GENERAL LAWS, ENTITLED 'UNCLAIMED ESTATES', AMENDING SECTION 19-11-9 IN CHAPTER 19-11 OF THE GENERAL LAWS, ENTITLED 'DEPOSITS' ", R. I. Pub. L., 1961, Ch. 195 (hereinafter Statute of Escheats):

"Sec. 6. Chapter 33-21 of the general laws, entitled 'Unclaimed estates', is hereby amended by adding thereto the following sections:

* * *

'33-21-12. Intestate estates to escheat. – If any person, who, at the time of his death, has been or shall have been, the owner of any personal property within this state, and shall have died, or shall die, intestate, without heirs or known kindred, capable of inheriting the same and without leaving a surviving spouse, such personal property, of whatsoever nature the same may be, shall escheat to the state; in the event such intestate was at the time of his death domiciled in this state, the personal property of such person wherever situate shall escheat to the state.

Nothing in this chapter shall be deemed to affect or otherwise impair the authority of any public administrator, heretofore established, to commence proceedings for administration, within five (5) years after the date of death, and the estate of any person who has died or who shall die or who died leaving any personal estate within this state, and leaving no heir, surviving spouse or legal representative to claim the same; provided, however, that upon the filing of a final account in such estate by the public administrator, he shall notify the attorney general, and the balance then remaining in the estate shall become escheatable by the state in accordance with the provisions of this chapter; and provided further, however, that no property in the possession of the general treasurer that has been taken into protective custody or has been escheated under this chapter shall be subject to administration by any public administrator.

* * *

'33-21-15. Appointment of escheator. – Whenever, by reason of any information filed with the attorney general, or which comes to his notice so that he shall become aware of the fact that any personal property has escheated or is subject to escheat to this state under the provisions of this chapter, he shall designate a member of his department to act as escheator of such property.

* * *

Sec. 7. This act shall take effect upon its passage, and all acts and parts of acts inconsistent herewith are hereby repealed."

The quoted parts of section 6 may be found in the Rhode Island Public Laws of 1961, January Session, at pages 680 through 682. Section 7 may be found at page 695.

The case also involves section 40 of "AN ACT TO REVISE, CONSOLIDATE AND AMEND CHAPTER 598 OF THE PUBLIC LAWS OF 1866 ENTITLED 'AN ACT TO REVISE, CONSOLIDATE AND AMEND THE ACT ENTITLED 'AN ACT TO INCORPORATE THE CITY OF PROVIDENCE,' AND THE SEVERAL ACTS IN ADDITION THERETO AND IN AMENDMENT THEREOF, AND THE SEVERAL ACT IN ADDITION THERETO AND IN AMENDMENT THEREOF,' R. I. Pub. L. 1940, Ch. 832 (hereinafter Providence City Charter):

"Sec. 40. *Terms of Office.* Except as otherwise provided in this charter, all officers of the city of Providence elected or appointed by the council, or whose appointment is subject to approval by the council, whether by authority of this charter or under any general or special law or laws pertaining to said city, shall be elected or appointed bienially on the first Monday of January, or as soon thereafter as may be, commencing in 1941, excepting the bureau of police and fire, the water supply board, the board of canvassers and registration, the board of park commissioners, the commissioners of sinking funds, the zoning board of review, the building board of review, the board of hospital commissioners, the

judge and clerk of the probate court, the retirement board, and any boards of officers now or hereafter established, the term of office of any members of which exceeds two years, and any other officers whose terms as now or hereafter established by law exceed two years. All officers of this city, however elected or appointed, shall hold their respective offices for the term or terms for which they are respectively elected or appointed and until their successors are duly chosen and qualified, and all vacancies, unless otherwise provided by law, shall be filled for the remainder of the term."

Section 40 may be found in the Rhode Island Public Laws of 1940, January Session, at page 235.

The case also involves sections 157, 158, 159 and 160 of Article XV of Chapter 2 of "THE REVISED ORDINANCES OF THE CITY OF PROVIDENCE, RHODE ISLAND 1946":

"Sec. 157. Enumeration and terms of office. The city council shall elect on the first Monday in January bienially, commencing A. D. 1913, the following officers, namely: One or more viewers of fences; a pound keeper at the Dexter Asylum, and a pound keeper at Roger Williams Park; three or more port wardens; one or more packers of fish; *a public administrator*; an inspector of saleratus, bicarbonate of soda and cream of tartar; an inspector of chain cables; an inspector of beef and pork; a sealer of leather; one or more inspectors of hoops; one or more surveyors and corders of wood; one or more surveyors and measurers of stone; one or more inspectors and measurers of carpenters', masons' and painters' work; two or more measurers of grain, meal, salt and sea-coal; one or more weighers of cotton; one or more appraisers of damage under the dog law; one or more auctioneers; a fire marshal; a superintendent of the burial of deceased soldiers and sailors; six or more cattle weighers; one or more weighers of coal and other articles of merchandise. * * *

Sec. 158. Commissions issued by city clerk. A commission shall be issued by the city clerk to any person elected to any of the offices enumerated in this chapter. * * *

Sec. 159. Fees for licenses and commission. The following fees are hereby established and fixed to be paid biennially for licenses and commissions issued to the following officers elected by the city council, viz:

Auctioneers, each, one hundred dollars.
Appraisers of damage under the dog law, each two dollars.
Deputy surveyors of lumber, each, four dollars.
Inspector of beef and pork, two dollars.
Inspector of chain cables, two dollars.
Inspector of pot and pearl ashes, two dollars.
Inspector of saleratus, bicarbonate of soda and cream of tartar, two dollars.
Inspectors and measurers of carpenters', masons' and painters' work, each, two dollars.
Measurers of grain, salt and sea-coal, each, two dollars.
Measurers and surveyors of stone, each, two dollars.
Packers of fish, each, two dollars.
Port wardens, each, two dollars.
Pound keepers, each, two dollars.
Public administrator, ten dollars.
Sealer of leather, two dollars.
Surveyor of lumber, ten dollars.
Surveyors and corders of wood, each, two dollars.
Viewers of fences, each, two dollars.
Viewers of hoops, two dollars.
Weighers of cotton, each, two dollars.
Weighers of coal and other merchandise, each, two dollars.
* * *

Sec. 160. Same – Collection by city collector. The city collector is hereby directed to charge and collect the foregoing fees of each officer named in the preceding list. Upon the presentation of the receipt of the city Collector showing that such fees have been paid by said officers, the city clerk shall

forthwith issue to such officer named in said receipt the license or commission to which he shall be entitled. * * *"

Sections 157, 158, 159 and 160 may be found in The Revised Ordinances of the City of Providence, Rhode Island (1946) at pages 120 through 122. (Emphasis supplied).

STATEMENT

Carrie Cumber (decedent), late of Providence, Rhode Island, died on December 1, 1954. (R. 103). She left no known husband or next of kin her surviving within the State of Rhode Island (R. 103) or elsewhere. Her estate is the subject matter of this case. The right to administer is claimed by the Petitioner and the Respondents. Title to the office of Public Administrator is in dispute between the Petitioner and the Respondent Maguire, both of whom now claim the title. From January 7, 1963, to January 4, 1965, the title has been in dispute between the Petitioner and the Respondent Kiernan.

The Petitioner is Martin Malinou of Providence, Rhode Island. The Respondents are Leonard A. Kiernan of Warwick, Rhode Island, and Francis J. Maguire of Providence, Rhode Island. The Public Administrator Act, section 1, delegated the power to appoint a public administrator to the City Council of the City of Providence, Rhode Island (city council). The city council elected the Petitioner to be Public Administrator on January 2, 1961, for the ensuing term ending on the first Monday in January 1963. (R. 101) The Statute of Escheats became law on June 10, 1961. The Petitioner claims that the Statute of Escheats repealed the power of the city council to elect a public administrator. (R. 127-8). On January 7, 1963 the city council elected the Respondent Kiernan to be Public Administrator for the ensuing term ending on the first Monday in January 1965. (R. 102). On January 4, 1965 the city council elected the Respondent Maguire to be Public Administrator for the ensuing term ending on the first Monday in January 1967.

(R. 102-3). On January 2, 1967 the city council re-elected the Respondent Maguire for the ensuing term ending on the first Monday in January 1969.

Bernard J. Gallagher, late of Providence, was the elected Public Administrator on the date of the decedent's death, and he was continuously re-elected to terms which ended on January 2, 1961. (R. 101). Gallagher had been the only person to seek original administration on the Cumber Estate. (R. 103). He received the grant of administration thereon on February 1, 1955. (R. 103). Gallagher died on September 14, 1962, without having fully administered the Cumber Estate. (R. 103).

On November 10, 1964 the Petitioner petitioned the Probate Court of the City of Providence (probate court) for administration d/b/n on the Cumber Estate. (R. 103; R. 136-7). On December 8, 1964 the Respondent Kiernan petitioned the probate court for administration d/b/n on the Cumber Estate. (R. 104; R. 132). By decree entered December 29, 1964 the probate court appointed the Respondent Kiernan administrator d/b/n of the Cumber Estate. (R. 104; R. 132). Petitioner appealed from the probate court decree to the Rhode Island Superior Court. During the pendency of the Petitioner's appeal to the Superior Court, on, to wit, February 17, 1966, the Respondent Maguire filed a motion in the Superior Court proceedings by which he sought to intervene therein and obtain the grant of admistration for himself. (R. 119-21). On January 3, 1967, Rhode Island Superior Court Associate Justice Fred B. Perkins certified the case to the Rhode Island Supreme Court (R. 99) on the parties' Agreed Statement of Facts (R. 101-14) for decision by the Supreme Court. Mr. Justice Perkins decree reads as follows (R. 99):

> "This cause came on to be heard before this Honorable Court on a motion to intervene as party appellee by Francis J. Maguire, claiming to act as Public Administrator, in the above-entitled probate appeal taken by Martin Malinou, claiming to act as Public Admin-

istrator, from the appointment of Leonard A. Kiernan, Jr., claiming to act as Public Administrator, to the trust of administrator d/b/n of the Estate of Carrie Cumber, and after hearing thereon an agreed statement of facts was filed in accordance with 2 R. I. Gen. L. (1956) 9-24-25, and pursuant thereto

It is ordered, adjudged and decreed that this cause be and the same is hereby certified to the Supreme Court of the State of Rhode Island to be there heard and determined."

All the parties took the oath of office following their respective elections to the office of Public Administrator. (R. 101-3). Respondent Kiernan never paid the ten dollar ($10) public administrator fee provided for in Providence, R. I. Rev. Ord. (1946) Ch. 2, Art. XV, Secs. 159, 160. (R. 102). The Respondent Maguire paid the public administrator fee on November 5, 1966. (R. 103). The Petitioner paid the public administrator fee on January 9, 1961. (R. 102)

How the Federal Questions Are Presented

Petitioner's claim of a denial of the equal protection of the laws, which presents the issue designated in these papers as QUESTION I, is raised for the first time in these papers. The Rhode Island Supreme Court declined to entertain the Petitioner's timely petition for reargument. (R. 5). The petition for reargument contained the claim of a denial of equal protection. Petitioner's petition for reargument stated as one ground for reargument that (R. 14):

"* * * in determining that the provisions of Prov. Rev. Ord. (1946) Ch. 2, Sec. 159, establishing a ten dollar fee, which appellee Kiernan did not pay, was merely directory, but that the provisions of Public Administrator Act, Sec. 11, establishing by interpretation in this case a petition requirement to which the appellant Malinou is not shown to conform, was mandatory, this Court denied the Appellant the 'equal protection of the laws', in violation of U.S. Const. Amend. XIV, Sec. 1 * * *".

Petitioner's claim of a denial of procedural due process, which presents the issue designated in these papers as QUESTION II, is raised for the first time in these papers. The Petitioner's petition for reargument contained the claim of a denial of procedural due process. The petition for reargument stated as grounds for reargument that (R. 13-14):

> "1. This Court overlooks the fact that its judgment rendered on November 7, 1967, denies and dismisses the Appellant's appeal instead of remanding the case to the Superior Court for further proceedings not inconsistent with the opinion filed therewith, contrary to the Appellant's right to procedural due process of law guaranteed by U. S. Const. Amend. XIV, Sec. 1 * * * in that this Court has, in its opinion announced a new procedural rule requiring the Appellant to have filed a written petition for administration d/b/n during his term of office in order to have secured his right to receive the grant of administration d/b/n on the Cumber Estate, without affording the Appellant an opportunity to show that a rule of the probate court declared that the Appellant's written petitions for administration d/b/n on the estates not fully administered by Gallagher would not be accepted for filing.
>
> 2. This Court overlooks the fact that the judgment rendered on November 7, 1967, denies and dismisses the Appellant's appeal instead of remanding the case to the Superior Court for further proceedings not inconsistent with the opinion filed therewith, contrary to the Appellant's right to procedural due process of law guaranteed by U. S. Const. Amend. XIV, Sec. 1 * * * in that this Court has, in its opinion, announced a new procedural rule requiring the Appellant to have made a verbal petition for administration d/b/n during his term of office in order to have secured his right to receive the grant of administration d/b/n on the Cumber Estate, without affording the Appellant an opportunity to show that he had verbally so petitioned the probate court for administration d/b/n on the Cumber Estate."

The issues designated as QUESTIONS III, IV and V in these papers were raised in the Petitioner's Reasons of Appeal from the probate court decree to the superior court. (R. 125-30). The issues were briefed and argued to the supreme court which failed to pass on the constitutional questions. The parties' briefs are part of the record. (R. 36-90). The Petitioner's Reasons of Appeal from the probate court decree to the superior court reads as follows (R. 126-28):

> "SECOND: That on the 2nd day of January, 1961, pursuant to an act of the General Assembly of the State of Rhode Island, entitled 'An Act Providing for the Appointment of a Public Administrator in the City of Providence,' passed on the 2nd day of June, 1876, and in force on the 2nd day of January, 1961, and all acts supplementary thereto and amendatory thereof (hereinafter referred to as the Public Administrator Act) your appellant-petitioner was duly elected or appointed Public Administrator by the City Council of said City of Providence and was thereafter duly qualified to act as such; and that your appellant-petitioner thereby became, and was on September 14, 1962, the singular 'successor' to said Bernard J. Gallagher within the meaning of the Public Administrator Act, Section 11: * * *
>
> * * *
>
> FIFTH: That said decree whereby said court appointed Leonard A. Kiernan, Jr. of Providence administrator de bonis non of the Cumber Estate aggrieves your appellant-petitioner in that it denies him his right of 'property' (within the meaning of U.S. Const. Amend. XIV, Sec. 1) to administer the goods unadministered by said Bernard J. Gallagher vested in him as the singular 'successor' (within the meaning of the Public Administrator Act, Section 11) to the right of 'property' to administer the Cumber Estate originally vested in said Bernard J. Gallagher on the death of the said Carrie Cumber on December 1, 1954, by virtue of the Public Administrator Act, Section 2: * * *

> SIXTH: That said decree whereby said court appointed Leonard A. Kiernan, Jr. of Providence administrator de bonis non of the Cumber Estate aggrieves your appellant-petitioner in that it appointed as administrator de bonis non a person not a duly elected or appointed public administrator in and for Providence pursuant to the Public Administrator Act, for the authority of the City Council of the City of Providence to appoint a public administrator conferred by the Public Administrator Act, Section 1 was impliedly repealed by P. L. 1961, Ch. 195, Sec. 6, 7, approved on the 10th day of June, 1961, * * * *
>
> Pursuant to Rule 33 of the Rules of Practice and Orders of the Superior Court (1957), your appellant-petitioner puts the appellee-respondent upon proof of any capacity he alleges as Public Administrator under authority of the Public Administrator Act.
>
> SEVENTH: That said decree whereby said court appointed Leonard A. Kiernan, Jr. of Providence administrator de bonis non of the Cumber Estate aggrieves your appellant-petitioner in that it appointed as administrator de bonis non a person supposedly elected or appointed Public Administrator by the City Council of the City of Providence by election number 44, on January 7, 1963, which council action has operated to deprive your appellant-petitioner of his right to administer the goods unadministered, contrary to U. S. Const. Amend. XIV, Sec. 1: 'nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .' * * *"

The Petitioner's claim of a substantive property right under the doctrine of *Malinou v. Cairns*, 231 A.2d 785 (RI 1967), and his deprivation thereof without due process, which presents the issue designated as QUESTION VI in these papers, is raised for the first time in these papers.

The Petitioner's claim, under 28 U. S. C. 1257(3), of

a right to file this petition for certiorari to preserve any future possibility he has of securing review in this Court of the action of the Rhode Island Supreme Court taken in this case on November 7, 1967, is raised for the first time in these papers, and is designated herein as QUESTION VII. The Rhode Island Supreme Court denied the Petitioner's timely motion to re-settle the judgment sought to be reviewed. (R. 5). The motion to re-settle the judgment contained the claim of the Petitioner's right to receive a final judgment in order that the Rhode Island Supreme Court's action may be subject to review in this Court. (R. 19):

> "1 The judgment is not clear as to what 'appeal of the appellant' is to be denied and dismissed. Is it the appeal from the probate court decree to the superior court or is it the instant proceeding which is docket numbered 44A?
>
> 2 Is the probate court decree dated December 29, 1964, to be affirmed? The opinion does not make a direction to affirm.
>
> 3 The intervenor is not affected by the probate court decree dated December 29, 1964, since he did not exist at the time of the entry. Is his motion to intervene to be granted or denied? Since the judgment of this Court does not make any order or direction for an order respecting the intervenor, the issues between the intervenor and the Appellant are not adjudicated. The Appellant seeks the entry of a final judgment determining the issues presented by this case between the Appellant and Intervenor, in order that such final judgment may be the subject of further appellate review in the United States Supreme Court."

The order denying the Petitioner's motion to re-settle reads as follows (R. 5): "Petitioner's motions for leave to file a petition for reargument and to re-settle judgment are denied; * * *"

REASONS FOR GRANTING THE WRIT

I

The judgment should be reviewed to guide the bar with a definite answer to an important question posed by the "final" judgment rule of 28 U. S. C. 1257(3). If a judgment sought to be reviewed is final in that its remand to the trial court is only for ministerial purposes, but if the fact of appealable finality is not clear, must the Petitioner seek review of the first judgment rather than wait to secure a second (and plainly final) judgment on appeal from the ministerial action of the trial court, in order not to foreclose (under doctrines of law of the case and res judicata) review in this Court of the issues presented by the first judgment? Robert Stern and Eugene Gressman discuss this procedural problem in their treatise SUPREME COURT PRACTICE, Third Edition (BNA Incorporated 1962) 80, and suggest that it is best to seek review of the first judgment whenever its finality is a reasonable possibility, and, if unsuccessful, to bring up the second judgment later. The problem in terms of this case is raised in these papers by QUESTION VII.

The opinion of the majority of this Court in *Mills v. Alabama*, 384 U. S. 214, defines "final" judgment within the meaning of 28 U. S. C. 1257(3) to include judicial action which leaves just a few formal gestures to be had on remand to the trial court. Perhaps the judgment sought to be reviewed leaves just the formal gestures, granting the Respondent Maguire's motion to intervene and then affirming the probate court decree, to be had in the superior Court. On the other hand, the surprise judgment of the Supreme Court changing the procedural rules on which the Petitioner had relied (see infra, pp. 27-28) may be the basis for the Superior Court to grant Petitioner relief from the operation of the judgment sought to be reviewed after it hears now-relevant evidence consistent with the new procedural rules announced in the opinion delivered upon the ren-

dering of the judgment sought to be reviewed. The Superior Court has jurisdiction to grant such relief. Rhode Island Rules of Civil Procedure (1966), Rule 59(e). The point is that Petitioner does not know whether the judgment sought to be reviewed is "final". (1) He does not know whether or not the Superior Court will grant Respondent Maguire's motion to intervene, thereby making him a party to this case so that the title dispute between Petitioner and Respondent Maguire may be considered adjudicated in "final" form. (2) He does not know if the Superior Court will hear evidence tending to establish the fact that Petitioner verbally petitioned the probate court before Respondent Kiernan's election to office and that Petitioner was barred from filing written petitions in the probate court during his term in office; and Petitioner does not know if these facts will be reason for the Superior Court to grant him relief from the operation of the judgment sought to be reviewed, i.e. a new judgment appointing Petitioner administrator d/b/n.

The Petitioner wishes to preserve his possible opportunity of obtaining review in this Court of the issues decided by the Rhode Island Supreme Court on November 7, 1967. If he did not file the instant petition he would run the risk of having his opportunity for review of the QUESTIONS PRESENTED in these papers foreclosed under doctrines of law of the case and res judicata, when he at some future time seeks a review in this Court of a second judgment disposing of an appeal from the Superior Court's ministerial act of entering a final judgment on the Supreme Court decision of November 7, 1967. Does that risk exist? Such is the question of doubt and importance which this Court may wish to answer.

The judgment sought to be reviewed is contained in the opinion delivered upon the rendering thereof. (R. 34; Appx. A, p. 7). The judgment is as follows:

> "the appeal of the appellant be denied and dismissed. The record and the papers in this case are hereby sent

back to the superior court with our decision certified thereon for entry of a final judgment in accordance therewith."

This case had been certified to the Rhode Island Supreme Court by Superior Court Justice Fred B. Perkins, pursuant to 2 R. I. Gen. L. (1956) 9-24-25 which provides:

> "Whenever any civil action, legal or equitable in character, is pending in a district court or in a superior court, and the parties shall file in the clerk's office an agreed statement of facts in such action, the court shall certify the action to the supreme court to be there heard and determined. After having decided the action the supreme court shall send back the papers therein, with its decision certified thereon, to the court from which the action was certified, which shall enter final judgment upon the decision."

The judgment entering function of the Superior Court under the foregoing statute is merely to set forth on a separate piece of paper the judgment contained in the Supreme Court opinion. The Superior Court has not yet performed that ministerial function. When the time for performing that ministerial act arrives the doubt about the finality of the judgment sought to be reviewed will be a practical problem to the Superior Court because the Supreme Court has not completely said what its judgment is. The judgment sought to be reviewed does not affirm, reverse or modify the probate court decree. The judgment sought to be reviewed does not state whether the Petitioner's appeal to "be denied and dismissed" refers to his appeal from the probate court decree to the Superior Court or, in the alternative, to this case before the Supreme Court (i.e. No. 44-Appeal). The judgment sought to be reviewed does not grant or deny Respondent Maguire's motion to intervene. If a few formal gestures by the Superior Court can affirm the probate court decree and deny and dismiss the Petitioner's appeal therefrom to the Superior Court, the problem of whether to grant or deny the Respondent Maguire's motion to intervene cannot be resolved by a few formal

gestures in the Superior Court because the Superior Court must exercise discretion and decide if the Respondent Maguire had a justiciable claim to the administratorship of the Cumber Estate on the basis of his claim to the title to the office of Public Administrator. *Spooner v. Tucker*, 86 R. I. 266. The issue of whether or not he had such a justiciable interest is alive in terms of his claim (R. 121) to the title to the office of Public Administrator as against the Petitioner's claim thereto. The Rhode Island Supreme Court has said that Respondent Maguire now holds the title. (R. 32; Appx. A, p. A-6). If Respondent Maguire was not a party to this case before the Rhode Island Supreme Court then the title contest between Petitioner and Respondent Maguire was not adjudicated despite the Court's language that "the intervenor is now the incumbent public administrator" (R. 32; Appx. A, p. 6) and QUESTION III in these papers is not properly before this Court as to Respondent Maguire. Was Maguire a party below? His motion to intervene (R. 119) was never acted on.

Petitioner sought to resolve his doubts about the finality of the judgment sought to be reviewed by filing a motion to re-settle the judgment. (R. 19). In a memorandum opinion the Rhode Island Supreme Court declined to entertain the motion. (R. 5). Pertinent texts of the motion and memorandum opinion are set out supra, p. 18.) The finality problem was born in the surprise judgment sought to be reviewed. This Court has held that a federal question raised for the first time in papers addressed to this Court is raised at the proper time if the question is born in the judgment of the highest court in which a decision could be had and a timely petition for reargument therein is declined. See *Saunders v. Shaw*, 244 U.S. 317, 320. See also *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673. Articulated in these papers as QUESTION VII the finality problem was contained in Petitioner's motion to re-settle the judgment which was filed together with Petitioner's petition for reargument.

II

The judgment should be reviewed because it presents this Court with an opportunity to extend the veil of Fourteenth Amendment protection to public officers and to overrule *Taylor v. Beckham*, 178 U.S. 548, decided in 1900, in which a divided Court held that title to a public office is not Fourteenth Amendment "property".

The proliferation of administrative agencies since 1900 calls an ever increasing number of citizens to public office at lower salaries, more unpredictable tenure and subject to greater exposure to criticism than the executives of business and industry. Absence of public office from the list of property rights in the veil of Fourteenth Amendment protection increases the imbalance to the unnecessary detriment of state and national interests in competing with business and industry for personnel.

Petitioner contends that he held the title to the office of Public Administrator (as his Fourteenth Amendment "property") at all times during which the Respondent Kiernan claims to have held the title, i.e. from January 7, 1963 to January 4, 1965. The basis of the Petitioner's claim is twofold. First, the Petitioner claims the title as a holdover because Respondent Kiernan did not pay a ten dollar fee to become Public Administrator; the claim is presented by QUESTION V in these papers. Second, Petitioner claims the title because the city council had no power to elect Respondent Kiernan; the claim is presented by QUESTION III.

$10 Condition to Qualification

The city council elected Petitioner to the office of Public Administrator on January 2, 1961 for the ensuing term of two years ending on the first Monday in January, 1963. (R: 101). The Charter of the City of Providence, section 40 (set out supra, p. 9), is authority for the Petitioner to hold over until his successor is "duly chosen and qualified". The payment of the $10 public administrator fee established

by Providence, R. I. Rev. Ord. (1946) Ch. 2, Art. XV, Sec. 159 (set out supra, p. 11) was an element of qualification for Respondent Kiernan (R. 31; Appx. A, p. 4-5). Petitioner contends that payment of the fee was also a condition precedent to complete investiture in office.

City Council Cannot Choose Successor

As aforesaid, Petitioner was elected Public Administrator for a term of two years on January 2, 1961, and, under the Charter of the City of Providence, section 40, until his successor was chosen and qualified. The Statute of Escheats became law on June 10, 1961. Petitioner contends that the Statute of Escheats, sections 6(33-21-12 and 33-21-15) and 7, impliedly repealed the city council's power to elect a public administrator under Public Administrator Act, section 1, and therefore the city council could not elect Respondent Kiernan on January 7, 1963. The Statute of Escheats, section 6(33-21-12) expressly saves "the authority of any public administrator, heretofore established" while section 6(33-21-15) thereof delegates the Attorney General's designee to carry out the provisions of section 6(33-21-12) declaring that the estates of persons who die "intestate, without heirs" shall escheat to the State of Rhode Island. Section 2 of the Public Administrator Act (set out supra, p. 5) places the same class of estates within the jurisdiction of the Public Administrator. The nub of the Petitioner's claim that the saving clause was intended to save his authority (and not the appointing authority of the city council) is that the saving clause does not disclose a crystal clear intent to save the authority of the city council to appoint a public administrator. Section 7 of the Statute of Escheats declares that "all acts and parts of acts inconsistent herewith are hereby repealed". The opinion delivered upon the rendering of the judgment sought to be reviewed does not interpret the saving clause or section 7, nor does the opinion refer to them in any manner. (All parts of the Statute of Escheats referred to in this paragraph are set out supra, p. 8; a history of the saving clause will be briefed if certiorari is granted.)

What has been said regarding the repeal of the city council's power to elect Respondent Kiernan to the office of Public Administrator applies as well to Respondent Maguire whom the city council elected on January 4, 1965 and re-elected on January 2, 1967, and against whom Petitioner now claims the title to the office of Public Administrator (as his Fourteenth Amendment "property"); the claim is presented by QUESTION III in these papers.

III

The judgment should be reviewed because it presents a novel question of federal constitutional law specifically comprised within QUESTIONS III, IV and V in these papers and underlying QUESTIONS II and VI, to wit: Is the right of the Public Administrator to administer an estate within the purview of the Public Administrator Act his "property" within the meaning of U. S. Const. Amend. XIV, Sec. 1? QUESTION IV asks the next question: When does the "property" right vest?

In this case the Rhode Island Supreme Court interprets the Public Administrator Act, section 11, as granting a public administrator an interest in administering intestate estates which interest extends beyond his term in office. The opinion labels that interest "public policy" (R. 34; Appx. A, p. 6), expressly rejects the idea that it is a contract right (R. 28; Appx. A, p. 2) and fails to discuss the argument that it is a "property" right. But Petitioner contends that the Rhode Island Supreme Court has recognized a property right created by the Public Administrator Act, which property vests in the person of the public administrator. Proceeding from the holding that public policy extends the right of a public administrator to administer an intestate estate beyond his term of office, the Petitioner points out that public policy is a principle of law, and Petitioner calls the Court's attention to the philosopher Bentham who recognized this truth that property is a jural concept

existing by virtue of law: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." Bentham, THE THEORY OF LEGISLATION 111-13 (London ed. 1931). The term "property" within the meaning of the Fourteenth Amendment, therefore refers to those interests or claims possessed by private parties and recognized and protected by law. Hecht, FROM SEISIN TO SIT-IN: EVOLVING PROPERTY CONCEPTS, 44 B. U. L. Rev. 435, 439 (1964).

The Rhode Island Supreme Court did not find it necessary to discuss public policy when in 1906 it held that a town tax collector had the exclusive right to collect the whole amount of a tax assessed during his term of office although the collection process therefor continued after his term expired. *Briggs v. Carr*, 27 R. I. 477. The property right treatment accorded the tax collector's interest in collecting the tax is a theoretical explanation for the holding although the court does not state the philosophy of its holding.

Having accepted the concept of a Fourteenth Amendment property right in the right belonging to the public administrator to administer the goods of the Cumber Estate left unadministered by the deceased public administrator Gallagher, the essential question to this case is: When does it vest? A reading of section 11 of the Public Administrator Act (set out supra, p. 7) leads to the conclusion that the right to be administrator d/b/n of the Cumber Estate vested upon the death of Gallagher leaving the estate not fully administered. Gallagher died on September 14, 1962 (R. 103), while Petitioner was Public Administrator (R. 101-2). Therefore, the right to administer the unadministered goods of the Cumber Estate vested in Petitioner. This argument assumes, arguendo, that Respondent Kiernan succeeded Petitioner in the office of Public Administrator on January 7, 1963.

IV

The judgment should be reviewed because three plain errors inhere therein. The errors are presented in these papers by QUESTIONS I, II and VI.

Regarding QUESTION I. – Petitioner contends that the Rhode Island Supreme Court's refusal to enforce Providence, R. I. Rev. Ord. (1946) Ch. 2, Art. XV, Sec. 159, requiring Respondent Kiernan to pay a ten dollar fee for his commission to the office of Public Administrator, together with a simultaneous refusal to follow *Robbins v. Tafft*, 12 R. I. 67 and probate court practice to the effect that Petitioner's right to administer the Cumber Estate is not forfeited by his not petitioning therefor, denies Petitioner the "equal protection" of the ordinance and the case law to the end result of denying him his right to administer the Cumber Estate, contrary to U. S. Const. Amend. XIV, Sec. 1.

State judicial action may deny a litigant the equal protection of the laws in violation of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1. Whether or not state judicial action has in given circumstances denied a litigant the equal protection of the laws is a matter to be decided on the facts of each case. *Griffin v. School Board*, 377 U. S. 218, 230. Showing that different persons are treated differently is not enough, without more, to show a denial of equal protection. *Ibid.* In this case not only were Petitioner and Respondent Kiernan treated differently in that Petitioner was required to pay the ten dollar fee to qualify for office (R. 102) while Respondent Kiernan was not so required (R. 102) but ruling case law was changed from the Petitioner's favor to the favor of Kiernan. The case of *Robbins v. Tafft*, 12 R. I. 67 gave the probate court jurisdiction to appoint personal representatives *sua sponte*, without anyone invoking the court's jurisdiction by petition. And in a line of probate court decisions the probate court appointed the public administrator to administer es-

tates within the purview of the Public Administrator Act although another person initiated the administration proceedings. See, *e.g. Estate of Mary Schaufelberger*, docket No. 54849, Probate Court of the City of Providence. The Rhode Island Supreme Court has in this case repudiated both *Robbins v. Tafft, supra*, and the probate court practice by announcing the procedural rule that the public administrator (Petitioner) must petition the probate court or forfeit his right to administer the Cumber Estate. Both new rules, (1) the rule that payment of the ten dollar public administrator fee is not essential to qualification and (2) the rule that the public administrator must petition the probate court to secure his right to administer – work to deny the Petitioner the right to administer the Cumber Estate. Both new rules are necessary to deny him that right, for by the first rule not Petitioner but Respondent Kiernan was public administrator when Petitioner, on the instant record, sought administration d/b/n on the Cumber Estate, and by the second rule Petitioner had forfeited any administration right he had on the date of Gallagher's death by not petitioning the probate court before his term in office expired.

Regarding QUESTION II. – The action of state courts depriving parties of substantive rights without providing adequate notice and opportunity to defend is a denial of procedural due process. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673. In this case the Rhode Island Supreme Court announced a new procedural rule operating to require Petitioner to have petitioned the probate court to perfect his right to administer the Cumber Estate. By not remanding the case to the Superior Court for the purpose of hearing evidence tending to establish the fact that Petitioner had verbally and timely petitioned the probate court, and the probate court rules prevented Petitioner from filing written petitions for administration d/b/n on estates originally administered by Gallagher, the Supreme Court has denied the Petitioner notice of its new rule and an opportunity to show compliance therewith. This argument regarding QUESTION II and the following argument regard-

ing QUESTION VI assume, arguendo, that Respondent Kiernan succeeded Petitioner in the office of Public Administrator on January 7, 1963 – as Kiernan claims.

Regarding QUESTION VI. – On July 12, 1967 the Rhode Island Supreme Court held, in the case of *Malinou v. Cairns*, 231 A.2d 785, certiorari denied, __U.S. __, that in the case of estates falling within the purview of the Public Administrator Act, any party-in-interest who files a petition for administration before the public administrator files a petition therefor is entitled to receive the grant of administration prior to the public administrator. In this case the Petitioner, on November 10, 1964, filed a written petition for administration d/b/n on the Cumber Estate. (R. 103; R. 136-7). He alleged therein that he was the Public Administrator. (R. 137). The title was in dispute and Petitioner was clearly a party-in-interest since he had a justiciable interest in both the title of Public Administrator and the administratorship of the Cumber Estate. A party in interest is one with a justiciable interest. *Spooner v. Tucker*, 86 R. I. 266. On December 8, 1964, Respondent Kiernan filed a petition for administration d/b/n on the Cumber Estate. (R. 104; R. 132). These facts under the priorities of *Malinou v. Cairns, supra,* give the Petitioner a right to administer the Cumber Estate as against Respondent Kiernan.

QUESTIONS I, II and VI in these papers were born in the surprise judgment sought to be reviewed. This Court has held that a federal question raised for the first time in papers addressed to this Court is raised at the proper time if the question is born in the judgment of the highest court in which a decision could be had and a timely petition for reargument therein is declined. See *Saunders v. Shaw*, 244 U. S. 317, 320. See also *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673. QUESTIONS I and II were contained in Petitioner's timely petition for reargument (R. 13-14) which the court declined (R. 5). QUESTION VI was not contained in Petitioner's petition for reargument because it

would have been inappropriate to raise the issue therein. At the time the reargument petition was filed (November 13, 1967) this Court had not ruled on the Petitioner's petition for certiorari (filed on October 10, 1967) in which he urged on this Court the unconstitutionality of the holding he now relies on. *Malinou v. Cairns,* PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND, No. 712, October Term, 1967, pp. 15-17. This Court denied the petition for certiorari on December 18, 1967. __U.S.__. The Court denied a petition for rehearing on January 29, 1968. __ U.S. __.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

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